BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MASHON D. JONES, Claimant, v. NEIBUR GOLF, Employer, and ZURICH NORTH AMERICA, Surety, Defendants.	)	**IC 2005-007073** **ORDER** FILED JUL 31 2008

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to show that he suffered an accident in the course of his employment.

2. All other issues are moot.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 31st day of JULY, 2008.

INDUSTRIAL COMMISSION

/S/_____
James F. Kile, Chairman

Participated but did not sign
_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 31ST day of JULY, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

D. Scott Summer
P.O. Box 1095
Caldwell, ID 83605-1095

Thomas P. Baskin
P.O. Box 6756
Boise, ID 83707

db /S/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MASHON D. JONES,	)	
	)	
Claimant,	)	**IC 2005-007073**
v.	)	
	)	
NEIBUR GOLF,	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW,**
Employer,	)	**AND RECOMMENDATION**
and	)	
	)	
ZURICH NORTH AMERICA,	)	FILED JUL 31 2008
	)	
Surety,	)	
Defendants.	)	
	)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on November 8, 2007. D. Scott Summer represented Claimant. Thomas P. Baskin represented Defendants. The parties presented oral and documentary evidence and submitted briefs. The case came under advisement on February 27, 2008. It is now ready for decision.

ISSUES

According to the Notice of Hearing the issues to be decided are as follows:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;

2. Whether and to what extent Claimant is entitled to attorney fees; and

3. Whether Idaho Code § 72-208 applies.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a brain injury driving Employer's service truck between jobsites. Although late in the evening, he was returning to work after receiving a key and instructions from supervisors. He was acting in the course of employment. He was drunk because his supervisor gave him tequila.

Defendants contend Claimant was not on any work-related business when he drank the tequila nor when he took Employer's truck and drove it while drunk. He took the truck because he and his wife argued about whether he could safely drive the family car. Supervisors did not instruct or expect Claimant to return to work that evening. Claimant made two social calls to supervisors' homes. He was anticipating his birthday the next day.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant's wife, accident witness Leslie Gross, former employee Doug Titus, and Employer's managers Chad DePauw, Roy Cassens, and Lucas McGarry;

2. Exhibits 1 – 17; and

3. Depositions of Claimant's wife, supervisor Bernardo Estrada, and Idaho State Police officer Aaron Bingham.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant was unavailable as a witness. His brain injury left him with no memory of the accident or of any relevant events preceding it.

2. Employer was constructing two golf courses 18 to 20 miles apart – Jug Mountain and Tamarack. Jug Mountain is a few miles south of McCall. Tamarack is further south, but

well north of Cascade. Claimant lived nearer to Tamarack. If traveling between Jug Mountain and Tamarack, a ten-minute detour would take a person to Claimant's residence where he lived with his in-laws, Mr. and Mrs. Schliester.

3. Claimant worked for Employer as a mechanic's assistant. He began in June 2005. Roy Cassens was the mechanic under whom Claimant worked.

4. Claimant usually began his work day at 6:00 a.m. He usually completed his work day at or before 6:30 p.m. Daylight permitting, he occasionally worked later.

5. Company policy forbade either Claimant or Mr. Cassens from keeping Employer's service truck overnight. In addition to the value of Employer's vehicle and property, the service truck carried about $30,000 worth of tools which personally belonged to Mr. Cassens. Claimant asked if he could keep the truck overnight for purposes of driving to and from the job site and was told, "No." Claimant was allowed to stop Employer's service truck at his home for meal breaks occasionally.

6. Jug Mountain Supervisor Lucas McGarry once saw Claimant driving Employer's service truck in McCall about 7:00 or 8:00 p.m. He questioned Claimant about it. Claimant responded he had brought the truck to town to be washed.

7. On July 5, 2005, Claimant finished his work for the day and delivered Employer's service truck to Mr. Cassens at Jug Mountain about 6:30 p.m. Claimant rode with his wife and child to McCall in the Schliesters' vehicle which they frequently borrowed.

8. At McCall, he visited Tamarack supervisor Bernardo Estrada. He drank tequila at Mr. Estrada's home. Claimant drove to visit Mr. Cassens, also in McCall. Claimant left Mr. Cassens' residence about 8:30 p.m. Mr. Cassens testified he could not recall being aware at that time that Claimant had been drinking or was intoxicated.

RECOMMENDATION - 3

9. Claimant drove the Schliester's vehicle from McCall to Jug Mountain. Claimant's wife testified they had an argument over whether he was able to safely drive.

10. Claimant left the Schliester's vehicle, walked a distance to Employer's service truck, and began driving south. Claimant's wife drove the Schliester's vehicle.

11. The accident occurred a few miles later, on Highway 55 just south of the Maki Lane intersection, at approximately 10:37 p.m.

12. Claimant was injured in a one-vehicle roll over while driving Employer's service truck. Claimant's blood-alcohol level was .14. The blood sample was taken at St. Alphonsus in Boise after Claimant had been life-flighted there.

13. Claimant's birthday is July 6.

DISCUSSION AND FURTHER FINDINGS OF FACT

14. **Credibility.** Claimant's wife made multiple, material misstatements of fact at hearing. Irreconcilable inconsistencies exist between her deposition testimony and her hearing testimony. (For example, in her deposition Claimant's wife testified Mr. Estrada "must have" given Claimant the JCB key, but at hearing she testified she actually saw Bernardo hand Claimant the key.) Such inconsistencies also appear within a single examination in her deposition. (For example, Claimant's wife testified she did not overhear the conversation between Claimant and Mr. Cassens at Mr. Cassens' house, but shortly thereafter began reciting what each man had said during her alleged version of that conversation.)

15. Other parts of her testimony are inherently incredible. (For example, she testified she observed frequent, excessive alcohol consumption by Employer's workers in the mornings during working hours.) Still other parts raise questions which require unusual and unlikely assumptions to square them with other testimony. (For example, Claimant's wife testified a

Mexican gentleman working on a bulldozer informed Claimant that he needed to go to Mr. Estrada's house to pick up a key. However, all other testimony shows that Mr. Estrada and Mr. Cassens regularly communicated with each other by cell phone regarding needed work at Tamarack. Mr. Estrada would not likely telephone an unknown Jug Mountain equipment operator to direct Claimant to return to work. Additionally, Claimant had just finished conversing with Mr. Cassens immediately before this alleged conversation with the bulldozer operator, and Mr. Cassens denied that Claimant had additional work to perform that evening and denied that Mr. Estrada had called him to report that any equipment at Tamarack needed work that night. Finally, Mr. Estrada denied that he gave Claimant a key during the relevant visit.)

16. Claimant's wife's testimony is irreconcilably inconsistent with other reasonable, corroborated testimony and evidence of record. (For example, Claimant's wife testified that she waited for her husband to pass by in the service truck and then followed him onto Highway 55 after one or two vehicles passed by between them. However, Ms. Gross testified that Claimant's wife preceded Claimant onto the highway, and Claimant followed his wife at a high rate of speed, ignored the stop sign, and, after he crashed, Claimant's wife returned to the accident scene from a location south of it, presumably having turned around to do so.)

17. Credible witnesses unequivocally denied making comments which Claimant's wife attributed to them. (For example, Mr. Cassens denied telling Claimant he could quit work early on his birthday if he worked late the night before.)

18. Claimant's wife confabulated details of conversations as if accurately recounting these comments. She simultaneously professed a failure of memory about disprovable facts incidental to these conversations. These facts would have been obvious to her if the conversations had actually occurred or if she had been present to see or hear them.

RECOMMENDATION - 5

19. Claimant's wife offered hearsay testimony of comments Claimant allegedly made that evening. There are insufficient indicia of trustworthiness to assign significant weight to this hearsay.

20. Finally, Claimant's wife's demeanor at hearing appeared to reflect her desperation, her willingness to say anything to help her husband's cause.

21. Claimant's wife's testimony was thoroughly impeached on cross-examination. Claimant's wife is not a credible witness.

22. All other witnesses were credible. Minor inconsistencies which arose between credible witnesses were within the realm of normal lapses of memory or differences of perspective.

23. **Course and Scope.** A claimant's injury must arise from an accident arising out of and in the course of employment. Idaho Code § 72-102(18); Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). The terms "arising out of" and "in the course of" have distinct meanings. The first refers to the origin or cause of the accident, the second to the time, place, and circumstances. *See*, Louie v. Bamboo Gardens, 67 Idaho 469, 475, 185 P.2d 712, 714 (1947)(accident "in the course of" but not "arising out of" employment). Here, the parties agree that Claimant's accident was "arising out of" employment because he was authorized to drive Employer's vehicle for work and was in Employer's vehicle on a route which was a normal part of his work. They disagree whether Claimant was "in the course of" employment.

24. Claimant is mentally unable to testify as a result of his injury. Claimant was in Employer's vehicle when the crash occurred. Idaho Code § 72-228 establishes a presumption that the injury arose out of the employment when certain conditions are present. Resort to this

presumption is unnecessary. Defendants conceded the injury arose out of the employment.

25. To be applicable, §228 requires "unrebutted prima facie evidence that indicates that the injury arose in the course of employment." This case centers around whether Claimant's injury occurred "in the course of" employment. Evidence rebutting Claimant's allegation that he was in the course of employment abounds, including the following: Claimant's normal work day occurred within the hours between 6:00 a.m. and 6:30 p.m.; He returned the vehicle to its customary overnight parking location at his customary evening quitting time; He was not authorized to use or keep the vehicle overnight; He returned to the vehicle and began driving it after 10:00 p.m., and no supervisor ordered or expected Claimant to return to work that evening. Thus, "substantial evidence to the contrary" is present. Regardless, recognizing or failing to recognize the presumption is irrelevant to the central question. Idaho Code § 72-228 does not create a presumption that an injury occurred in the course of employment.

26. Employer enforced its policy prohibiting Claimant from driving the truck after hours. On the one occasion on which any supervisor noticed Claimant potentially doing so, he questioned Claimant about it. Claimant's response shows he was aware that he should be on Employer's business when driving the truck.

27. Allowing for reasonable imprecision in credible testimony, there remains at least one hour, almost two, unaccounted for between the time Claimant left Mr. Cassens' house and the accident. The Referee takes judicial notice that it would not require one hour to drive from McCall to Jug Mountain to the accident location. Nevertheless, the Referee will not speculate about what may have occurred in that lapse of time nor about how long the argument lasted between Claimant and his wife.

28. Claimant's wife alleges that the JCB key is the tangible evidence which shows

that Claimant was returning to work on the night of July 5, 2005. The key was given to Trooper Bingham on August 17, 2005. There is no evidence, beyond Claimant's wife's testimony, that the key was in the Schliester's vehicle on July 5, 2005. Moreover, the presence of an employer's property in an employee's vehicle does not, by itself, determine whether an employee was in the course of employment at the time of a vehicle accident. *See*, Krueger v. Kit Homebuilders, West, LLC, 2005 IIC 0336. Further, its mere presence in the Schliester's vehicle would not indicate Claimant's intent on the night of July 5, 2005. Finally, other testimony and documentary evidence shows that at all relevant times, the vehicles for which this key might have been used were at Jug Mountain, not at Tamarack.

29. Claimant's wife alleges that Mr. Estrada's recollection of an equipment failure at Tamarack on the morning of July 6, 2005 supports her testimony that Claimant intended to return to work on the night of July 5. Claimant's counsel's attempt to suggest that the equipment failure was discovered when employees arrived at work on July 6 is without substantial support in the record. Rather, the evidence shows the equipment failed in the course of operation during the morning of July 6, not that it had failed the night before. It shows the maintenance likely required was not uncommon and that such failures frequently occurred.

30. Claimant's wife alleges that a company picnic was held at Mr. Estrada's house on July 4 and that alcohol was served. To the contrary, Mr. Estrada personally hosted the party. Claimant and his wife learned about and were invited to the party when they coincidentally met Mr. Estrada at the grocery store that morning or early afternoon. Every employee who testified about the picnic acknowledged that it was a private picnic and not a company picnic. The picnic does not provide a basis upon which Claimant can bootstrap an argument that Employer served alcohol to its employees.

RECOMMENDATION - 8

31. Testimony about who offered, who requested, or who served the tequila on the evening of July 5 is irrelevant. The visit to Mr. Estrada's house was purely a social call.

32. Claimant's wife testified Claimant frequently kept the truck overnight. Claimant's usual travel means and methods are irrelevant. Claimant's wife testified Claimant was actively returning to work that night when the accident occurred, not that he was taking it home overnight to have available to drive to work in the morning.

33. Claimant was not instructed, expected, or authorized to be driving Employer's service vehicle any more on July 5 after he left it at Jug Mountain that afternoon. Claimant was not in the course of employment when he drove Employer's vehicle and wrecked it, severely injuring himself.

CONCLUSIONS OF LAW

1. Claimant failed to show it likely that he suffered an accident in the course of his employment.

2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 23RD day of July, 2008.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

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